Thomas M. Cooley.

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OF

HABITS OF THOUGHT

UPON

OUR INSTITUTIONS.

SECOND ANNUAL ADDRESS

DELIVERED BEFORE THE

SOUTH CAROLINA BAR ASSOCIATION,

COLUMBIA, S. C., 2d DECEMBER, 1886.

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Mr. President and Gentlemen of the Association:

The historian Gibbon, in his account of the decline and fall of the grandest of ancient empires, has ventured the assertion that the united reigns of the Antonines were possibly the only period of history in which the happiness of a great people was the sole object of government. When it is remembered that government has no proper purpose but the happiness of the people, the assertion is likely at first to strike us with some degree of amazement; but as we reflect that all power and the management of all public affairs must be confided to the hands of fallible men, and that official character can neither convert into strength their weakness nor supply their imperfections, we are sorrowfully forced to acknowledge that the philosophical historian may not have spoken without warrant. If the Antonines in their public conduct succeeded in subduing altogether their individual selfishness, a thoughtful writer of the present day may be justified in what he says of the greater of the two, that Marcus Aurelius is perhaps the most beautiful figure in history—one of those consoling and hope-inspiring works which stand forever to remind our

weak and easily discouraged race how high human goodness and perseverance have been carried and may be carried again. A modern consensus of opinion, however, will, in all that pertains to patriotism and public virtue, place Washington by his side; and the greatest of the moderns and the purest of the ancients, as regards the motives to public conduct, may stand together above the reach of envious or malicious detraction, and be crowned with the reverent and unanimous homage of successive ages.

THE PRIVILEGED CLASSES.

In hereditary governments of monarchical or aristocratic form it occasions no surprise that the privileged classes come at length to look upon the right to govern as partaking of the nature of private property, or that when the hereditary king is dethroned or the privileged chief set aside, the parties displaced regard it as a personal rather than a general injury. But such is the force of habit that the non-privileged class may be found taking this view also, though it is a view hostile to all their just rights. The world is not likely soon to forget how for half a century after the English Revolution of 1688 the perpetual refrain of Jacobite song among all classes of society was an expression of passionate longing for the time when the King should "come to his own." The builders of Democratic institutions would not be likely to anticipate the springing up under them of the like notions, for Democratic government is by all for all, and the agent who for the time being wields public authority will be obligated and therefore expected to express in his action the public will for the public good, and to do so under constitutional limitations and forms. In America, however, we have seen, with the rise of party, a vicious notion not unlike it take root and rapidly grow to fearful power. The party successful in the latest election has for the time been looked upon as constituting, in a certain sense, a privileged class, and entitled as such to seize upon public trusts and appropriate them as spoils of party warfare. The notion was corrupting and Anti-Democratic, but for two generations it was so much a habit of mind with the American people to accept it as a legitimate incident to free institutions, that when a vigorous attempt was made to uproot it there seemed to be a necessity that the people should be called back for instruction in

the very rudiments of representative institutions. To many persons even yet the doctrine that the party in power holds the Government and its honors for party advantage, and that in the performance of public duty party interest may be first consulted, is so interwoven with the political ideas of a life-time, and connects itself so closely with the recollections of and reverence for their old leaders, that to the end of their days it will perhaps continue to be accepted as the true theory of practical politics, and be regarded as ~~being~~ in some sense a part of an unwritten fundamental law of the Union.

THE PEOPLE AND THE CONSTITUTION.

An unwritten fundamental law! Is there such a thing in America? The phrase sounds strange to the American ear. Our fathers recognized no such law, and made no provision for there being one at any time. Laws must, no doubt, in a free country emanate from the thoughts and desires of the people, and a beneficent law is likely to grow up irrespective of formal enactments; but our fathers believed that for the purposes of a fundamental law there would be peculiar excellencies in embodying the best thought of the time respecting the essential principles and framework of government in carefully worded terms, including in the written instrument everything that should be recognized as pertaining to the Constitution, and leaving nothing for tradition to bring forward from the misty past, nothing to be lugged in by uncertain precedent. Emphatically was this meant to be the case as regards the government of the nation, whose powers it was agreed should be enumerated for it in the Federal Constitution, so that by the very enumeration that instrument would set limits beyond which the Government could take neither ell nor inch. The Federal authority would thus be perpetually kept within assigned limits, and accretion of power by imperceptible stages would be impossible, because the landmarks could neither be removed, or hidden, or defaced. The State authority would at the same time be safe within the sphere reserved; for with the bounds permanently designated nothing could be lost by imperceptible decay. The founders were not so conceited as to suppose their work could stand unchanged for all time, but they agreed that changes when desired would be

made deliberately and by formal enactment of the States, and not otherwise.

THE LAW OF CHANGE.

Such was the structure the fathers devised and created, and it seemed to their sober judgment so well proportioned and of such solidity that they might reasonably expect that it would withstand indefinitely the trials and vicissitudes which might assail it. But whether they took sufficiently into account the various forces which continually, from day to day, operate upon institutions, bringing in now, perhaps irregularly, an obvious change known and seen of all, and again an unperceived change that slowly but surely may become a revolution, or whether they considered these forces at all as possibly affecting the solidity of their work, we can hardly at this time determine. We may assume it to be certain, however, that men like MADISON, and HAMILTON, and JOHN ADAMS, and MORRIS, and DICKINSON, who had made the science of government a study, were not ignorant of the fact that there never yet in the history of the world had been an instance of a stationary Constitution; of a Constitution so fixed and inflexible that neither the vicissitudes of public events nor the changing phases of political sentiment could in the least disturb its balance of power, or add to or take from the force of any of its commands or inhibitions. They could not have failed to note in the course of their historical studies that oftentimes the Constitutional changes were most complete when unacknowledged, as in Rome the Republic passed into an imperial despotism ages before the forms of freedom were dispensed with. And if these great men had been living a little later they might have seen in the experience of France that the most carefully prepared and popular written Constitution is not more secure than any other against sudden, violent and destructive changes, and may, indeed, be more easily overturned by the assaults of faction than it possibly could be if its principles, having their roots deep in the nature of the people, were only expressed in unwritten usages. But whatever the people, whatever their circumstances, whatever the nature of their institutions, the one law always present, always making itself felt and acknowledged in history, has been the law of

change. In vain the Locrian law-giver ordained that the proposer of a new law should appear with a rope about his neck, ready for immediate execution, if his proposal failed of acceptance; in vain Justinian denounced the punishment of forgery against the commentators who should venture to interpret or assume to improve upon his work in jurisprudence. The work of construction was no sooner completed than some new process of formation began, and that people was most fortunate who best succeeded in protecting the formative process against sudden and violent changes.

It was the just and peculiar glory of England that the unwritten Constitution of the realm, in its unfolding from the uncertain seed-planting of a barborous age, had kept even pace with advancing thought among its people, being neither hampered in its growth by formal but obsolete documents, nor checked or seriously perverted by party or revolutionary violence. But the American Constitution did not emerge from the obscurity of distant ages; it was the product of a single act of creative wisdom, and the founders could not, if they would, have calculated upon imperceptible changes. Agreement upon the whole charter was necessary, and had it not been understood that the written words of agreement would stand for all time unchanged, in meaning and obligation, ~~until~~ formally and by the method agreed upon, amended, the whole attempt at Constitution-making must have fallen to the ground, and the imperfect confederation must have been left to struggle a little longer for precarious and unprofitable existence.

When thus, wisely and abundantly as would seem, the need of such change as might be demonstrated by experience or required by circumstances was provided for, the founders had a right to expect that no others would take place unless by revolution; and they might justly hope that they had made revolution impossible, when a peaceful method of effecting radical reforms was thus brought by the Constitution itself within the reach of the popular will.

Nevertheless, the possibility of change was plain, even though the words remained unaltered. There would be change if deliberate usurpation should be acquiesced in until on all sides it should come to be accepted as rightful, the contention against it, if any, being at last abandoned; and the effect might be the same where

the failure to observe the proper limitations of power had been merely careless or inadvertent. In either case the law would nominally stand unchanged, but as a practical fact the law would be what the people understood it to be and what they obeyed. We may think we have the Constitution all before us; but for practical purposes the Constitution is that which the Government in its several departments and the people in the performance of their duties as citizens recognize and respect as such, and nothing else is. There is, says Machiavel, quoted with approval by Bacon, no trusting to the forces of nature nor to the bravery of words, except it be corroborated by custom. The old maxim is to the same purpose. Laws are nothing without manners, that is to say, without customary obedience. And Mr. BENTON was only a little extravagant when he once said that if the law were in the heart of the people he cared not to have it on the statute book.

TERRITORIAL ANNEXATION AND NATIONAL BANKS.

Consider how this may be in a few cases taken for illustration. Does the Federal Constitution authorize the acquisition of foreign territory? Mr. JEFFERSON, when leader and oracle of the dominant party in the country, said *No*, and able men among his adversaries agreed with him. Nevertheless he annexed a vast region, and the people approved the act, and made it a finality. A little later the Floridas were annexed, then Texas, then portions of Mexico. Who does not see that the question now is altogether a different one from what it was when Mr. JEFFERSON first raised it? Who will venture now to say that the Federal Constitution will not warrant what so often has been done under it? The power is settled as conclusively as in the nature of things is possible.

Another illustration may be even more appropriate than this. Does the Federal Constitution empower Congress to create National banks? Before the civil war half the people of the country would have said *No*, with an emphasis which policy could not moderate or judicial decisions weaken. But since the existing National bank system was established the *No* has been growing fainter and fainter, and has almost ceased to be heard. To call up the old Constitutional controversy and impart to it the old

vigor would be as impossible now as to summon living trees from the ashes of the fireside. The dispute has been settled—not by the Courts, but by the people. MARSHALL expounded, and for a time the people put aside his ruling; for though kindled with his genius and fed by the eloquence of the PINCKNEYS and WEBSTERS of the Bar, the "gladsome light of jurisprudence" can be little more than a phosphorescent glow until the people appropriate it and make it their own. CERVANTES says that "every one is the son of his own works." This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it.

THE UNION AND THE STATES.

But usurpation, whether intentional or the result of honest misconstruction, has had far less to do with disturbing the original equilibrium of National and State powers than some other causes which were inevitable and which only very imperfectly could have been anticipated. When the Federal Constitution was framed by far the larger proportion of all the concerns of Government were left to the control of the several States, and it is curious reading now, when we find in the letters and discussions of the period how concerned were some of the ablest statesman lest the Federal Government in its weakness should prove unable to resist encroachments. Evidently there was an expectation that the States would regard it as an object of natural antagonism, and as opportunity offered like a pack of wolves would pounce upon the living structure of union and, if possible, snatch from it vital powers. But nothing seems more obvious now than that from the first it should have been seen that the immense possibilities of the future lay unfolded in the grants of Federal power, not concealed among the reserved rights of the States. It was indeed perceived that this was true as regards the war power, and when HAMILTON was accused of desiring war as a means whereby the Federal authority might be improperly strengthened, the accusation was in itself an admission that

within the legitimate compass of that power there were consolidating possibilities which could not be fully provided against. But the same is almost equally true of some other grants of authority made to the Federal Union.

COMMERCE BETWEEN THE STATES.

Consider for a moment the power to regulate commerce between the States. How few and how simple were the occasions or the opportunities for the exercise of that power when the Federal Government was first formed. The commerce itself was small and was carried on in primitive ways. Travel was limited, and in some States monopolies in the carriage of passengers were granted. In the third year of the Union a proposition in Congress to authorize stage wagons to carry passengers was voted down because it might conflict with the privileges granted by the States. But by and by came the steamboat, and when, at a touch of the magic pen of the great Chief Justice, State monopolies in steam navigation vanished into nothingness how wonderfully the power to regulate commerce swelled into importance! A little later came the iron horse, with his tremendous energies, moving with the speed of the wind and with a strength like that of destiny, but in all its vast activity submissive to Federal legislation when the will to control is expressed. An then, as year by year new inventions keep coming to modify and quicken industrial and social life, this power of regulation naturally, if not inevitably, takes them under its protection; so that the statesman who contemplates the power enlightened by the wonderful contrivances whereby commerce is now enabled to accomplish such marvels, seems to perceive new meaning in the grant and sees it grow before his eyes, not from the expansion of latitudinarian construction, but as a necessary consequence of new subjects presenting themselves for its attention, and new and wonderful facilities of intercourse demanding its care. So day by day the Government control of Inter-State commerce takes upon itself importance and enlists more and more the interest of all the people. Its possibilities for the future seem almost illimitable; the imagination may revel among them but sober calculation is altogether at fault. Nevertheless, the power now so great, and potentially so much greater, is the same power

which by the Constitution was granted, and not any new or usurped power. What has proceeded from it has flowed legitimately, and as a result of the unforeseen being discovered, brought forward and utilized. Not from usurped territory, but "out of the old fields * * cometh all this new corn." In our Country, as elsewhere, steam and electricity, the imponderables of the material world which have been subdued and domesticated in the service of man, have made unexpected and wonderful contributions to the comfort and happiness of the people; but they have at the same time been equally busy with laws and institutions; moulding them into conformity with new conditions, and obliging even the jurists, to whom is intrusted the expounding of Constitutions, to follow to some extent their guidance, and recognize, in some particulars, the finality of their adaptive force.

THE TAXING POWER.

Another Federal power has grown to enormous proportions without having in its development been kept so entirely within constitutional limits. When Chief Justice MARSHALL had occasion for critical examination of the power to tax, which was being put in force by one of the States against a Federal corporation, he perceived, as by instinct, that its nature and purpose were such that in the exigencies of government it might be employed again and again until the subject of taxation was exhausted. In deciding the case before him, therefore, he uttered that famous truism that the "power to tax is a power to destroy." But it is, nevertheless, a life-giving and life-preserving power, and for that very reason involves such tremendous possibilities, since the possible needs of government ~~can stop at~~ admit of no limits. When, however, the time came that the interest of the nation was thought by Congress to require that the State banks should give way to a National system, and no express grant of the power to displace them was discoverable, this judicial aphorism that the power to tax is a power to destroy was seized upon for the purpose, and the life-giving power which exists for revenue purposes was seized upon and converted into a death-dealing power when revenue was neither sought for nor desired. This was a somewhat startling experiment in government, but it proved altogether successful, and the State

banks of issue which fell before it had been so mischievous, and the substituted system proved so satisfactory, that people gave little heed to the question of Constitutional power. But the thoughtful mind must admit that the benefit that flows from a doubtful exercise of power increases the danger by increasing the probabilities of repetition. If State banks may thus be destroyed, why not State insurance or commercial corporations? And who can say that the destructive power in its manifestations must necessarily stop at corporations and may not be extended to contracts entered into or industries existing under State authority? It is fresh within our minds that at the recent session of Congress a proposal was made and urged to tax a business of considerable magnitude out of existence, and though it failed, the very offer was important since it tended to familiarize the public mind with this extraordinary use of the taxing power and to increase the probability of success with similar proposals hereafter. But it is obvious that when public sentiment shall come to tolerate this method of summary extinguishment of State creations, Congress will have at its command an irresistible means for strengthening and extending its authority, which the people were so far from having intended to confer, that it is not conceivable, when the history of the Constitution is considered, that they would ever have consented to yield it. The taxing power they give freely with all its possibilities, but by thus "turning extreme medicine into daily food" it becomes no longer a taxing power in the normal and true sense, but a general power to deal at discretion with obnoxious subjects. We may then be called upon to revise the definition of the taxing power, for it will no longer be what Chief Justice MARSHALL understood it to be, the power which in its employment in raising revenue may incidentally kill, but a tremendous engine of destruction.

"THE PUBLIC WELFARE CLAUSE."

Another aspect in which the revenue power is of overshadowing importance is equally manifest. When we see it employed for the purpose of protection, and when a new law or even a slight change in the old law may at any time make or mar the fortunes of thousands, how insignificant to a business man of ambition and energy appear all that the State can do for personal interest,

when compared with what is within the compass of the Federal authority! Naturally and most inevitably he comes to think of the General Government as the true source of all power. Not seldom we see in publications of large circulation references to what is called the "public welfare clause" of the Constitution, which unmistakably indicates that in some minds the impression prevails that Congress has been given unlimited power to legislate for what it shall believe to be the general good. But a grant thus discretionary and unrestricted would be a grant of despotic power, and not only at war with the leading principle of the Federal Constitution, which limits both State and Federal authorities, but inconsistent with regulated liberty. The very suggestion of its existence ought, therefore, to be repelled instinctively as subversive of all Constitutional Government. Unfortunately it is more encouraged than repelled when some object of strong desire appears to be within reach of Congressional power. How far this, in the end, may prove mischievous cannot be foretold. At present we only perceive with distinctness that changes in our institutions to some extent are resulting. Every year the people, and especially the manufacturing and trading classes, come to look more and more to the National Capital for what enlists their interests and less and less to the Capital of their own State. Washington, after independence had been proclaimed, and during the trying period which immediately followed, found it necessary to make frequent complaints that some of the ablest men of the day — and among them JEFFERSON—would neglect National duties to take part in what seemed to them the more important affairs of their respective States. DEWITT CLINTON, many years later, resigned the place of Senator in Congress to accept that of Mayor of New York, and JOHN JAY, when head of the judiciary of the nation, laid off the ermine to become Governor of his own State. These are striking facts, but not likely to be repeated now.

A trespass may easily ripen into a right, and the barest assumption may lay the foundation for a most solid and permanent authority. We may regret such a result, and it may be our duty to prevent it if possible, but the result must follow if the causes be allowed to operate.

CHANGE THE LAW OF LIFE.

Nothing, however, is more certain than this, that the human mind accepts with complacency the idea of change. Change is the law of life and it enters into all things, seen and unseen. The perfect days of June are all the more delightful for their promise of October's transformations, and the features of the landscape on which the eye rests with calm satisfaction take in, in the subtle processes of the mind, new beauties as pleasing as they are indefinite. Childhood, charming in itself, is most charming for the future we see in it. The Roman matron who presented her manly boys as her jewels, saw them, not as they were merely, but as in the maturity of their powers they were to be; and if perennial boyhood could have been offered them she would, on their behalf, have proudly spurned the doubtful blessing. The law is as general as it is beneficial that nothing can satisfy the mind that does not enlist the imagination; so that even Elysian Fields, that should be too perfect for change, would at the same time be too monotonous for desire.

What is true everywhere else is true in what pertains to law and government. Insitutions so rigid and unyielding that they would stand unaffected by time or circumstances, when all things animate or inanimate, for which institutions exist, are perpetually renewing themselves under modified forms, and perpetually presenting to us a new world under new conditions, would be wanting in vital power because the affections of the people could not possibly embrace them. But in the nature of things such institutions would be impossible, unless for a people cut off from intercourse with the world, and with just that balance between mental energy and indifference which keeps it forever stationary. With even the most unprogressive people we see changes creeping in as the doors for external intercourse are thrown open, and China itself, by yielding a little here and a little there, gives proof of the universality of the law. The most conclusive proof of all, however, must be given by the American people. Taking post in the formation of their Government in advance of all the nations, and assuming an unquestioned leadership in putting in force the principles of equal liberty, they claimed to be "heir of all the ages" in whatever pertains to free thought and just

government, and the instructors of ages to come. The feeling of progress must, therefore, with them be spontaneous; the sensation of advance constant; they can never "stand at gaze like Joshua's moon at Ajalon." They may reverence the past, they may contemplate with satisfaction the present, but there must underlying all be a faith in a more perfect future, and this faith will be of the sort that moves mountains. The most rigid institutions must, from year to year, yield something to it; the most inflexible Constitution, in the light of new and unexpected conditions, must present new phases and suggest new possibilities. Occasionally, no doubt, we shall modify the Constitution here and there by formal amendment, but if the general tendency of the political society shall be to the development of a higher and better national life, the Constitution, the outer framework, cannot possibly remain altogether stationary.

THE GREATEST DANGER OF THE DAY.

Indeed, at this point is one of our chiefest dangers; a danger, the full extent of which we are not likely to perceive, except as we consider it carefully, and with philosophical mind, unblinded by the brilliancy of a national career altogether unparalleled in history. America is the accepted representative of progress, and our pride in the fact closes our eyes to its perils, so that we come to feel that whatever is new is progression, and we fall into the tide without considering whether it floats us on our accustomed course or rises to the breakers; whether it pursues the course of safety or of destruction.

It is not exclusively as they tend to magnify the Federal power that habits of thought are found to be productive of important changes. There may possibly be a revolution in the methods of government quite as important as any other, and if we observe with care the ordinary course of public business at the present day, we shall, perhaps, be forced to the conviction that a stage has been reached in our National history when the administration of the Government in strict conformity to the constitutional intent has become impossible and when for that reason a departure to an extent that is revolutionary may thoughtlessly be tolerated.

The United States is a representative Republic. Law-making

is confided to delegates popularly chosen, who are to assemble as a deliberative body. It is the duty of each of the delegates to make himself acquainted with the merits of all proposed legislation, and to take the advice and have the benefit of the judgment of his associates upon it. He is then to apply his own judgment to the question of its adoption. No member of the deliberative body can delegate the law-making function to another person, even though that other be one of his associates; but he in person must assume the responsibility. When the aggregate legislative judgment is expressed in solemn form, it is supposed to become law. There may, nevertheless, be still later a possible review by the Judiciary, the highest tribunal of which is an aggregate body, whose members are expected to bring to every controversy their individual judgments fully informed respecting it. Nothing short of this in either legislative or judicial action can answer the requirements of the Constitution.

EVILS IN LEGISLATION.

At the close of the first session of the Forty-ninth Congress one of its leading and most experienced members is understood to have expressed very strongly his dissatisfaction with public life and his desire to withdraw from it altogether. The reason for his dissatisfaction was that he had found it impossible to be useful to the country as he had wished to be in his legislative office. This is a most portentous fact if true, for the gentleman in question is a man of large intelligence and may justly be said to possess the confidence of the country to an unusual degree.

The special discouragement which affected this gentleman concerned the power which a few men in Congress, by reason of their positions, were permitted to exercise in controlling its business. An illustration had occurred in his own case. At the request of one of the heads of department he had matured and introduced an important measure for the reorganization of that department, but, despite his most earnest endeavors, he could neither secure for it the attention of the House nor bring it to vote. This was not because the bill was objected to, but because the chairmen of the two leading committees of the House, for purposes of their own and to further the legislation in which they took more special interest, saw fit to interpose obstacles,

and under the rules of procedure their power was sufficient to make these obstacles effectual.

If the complaint thus made is well founded, we have illustrated in a very striking manner the growth in Congress of powers unknown to the Constitution and out of harmony with its theory and purposes. It may appear still more plainly, however, from another fact which may now be noticed.

THE DESPOTIC POWERS OF THE SPEAKER.

When the recent session of Congress was about coming to an end there were awaiting final action in the popular branch a great number of bills which had gone through all the preliminary stages. This was not at all exceptional, but it was the customary condition of things when the adjournment approached. Some of the measures were of a public and some of a private nature, and each of them was in charge of some particular member, who, not only because of his interest in the measure, but also for his own reputation for skill and success in his office, was solicitous to put it upon its passage. It was quite impossible that in the time at command all the bills thus circumstanced should receive attention, and the few that should first be called up would alone be voted on. In such a state of things there must be a struggle among the members for recognition by the Speaker, and the recognition will perhaps be solicited in advance as a matter of special favor. The absolute necessity of recognizing some instead of others, when all are eager to catch the Speaker's eye, enables that officer to discriminate between measures; to permit any one at pleasure to be brought to vote, and for the time to defeat any other. This is a despotic power, and the Speaker, who by the theory of the Government is only one among a body of equals, is in fact enabled to exercise a veto more conclusive than the veto of the President.

How is it that such a state of things has come to exist? Apparently it has sprung from the vast increase of legislative business, which renders it quite impossible that legislation should be considered after the deliberate and impartial method of early days. The increase is, in fact, so great that it has ceased to be expected that all measures will be deliberately considered and discussed, and the so-called debates in the popular house of

Congress are for the most part a delivery of formal speeches to empty benches and for home use, at times when legislative business is actually suspended. That branch of Congress, at least, has, therefore, almost ceased to be a deliberative body.

The vast increase in the business of Congress is best shown by giving figures from the session already mentioned. At that session there were introduced in the two Houses of Congress, of bills and joint resolutions, the enormous number of 13,414. These in general were referred to committees, and resulted in upwards of 5,000 reports. These statistics are appalling to one who has been accustomed to regard Congress as a deliberative body, whose members brought their judgments to bear upon every subject voted upon. He perceives at once that, to a large extent, one must confide in the conclusions of committees, and that even, as between committees, it may be necessary to give a precedence to those whose duties concern the public revenue. But legislation then becomes legislation by committees, not by Congress, and members formally assent to measures of whose wisdom they have no opinion. It is even expected that the President, in the last hours of the session, will delegate his legislative function in like manner; going down to the Capitol building to sign bills as they are passed without the opportunity for consideration. If he refuses to do this, as President Cleveland recently did, he will be called churlish.

LOOSE WORK IN CONGRESS.

Is it necessary to add that this vast aggregation of business, and the haste with which at last it is likely to be disposed of, invite carelessness in legislation, cause mischievous blunders, and open broad doors to corruption? When a measure can receive the attention of a few of the members only, the few are likely to be those who have special, perhaps personal, interest in its passage. If it be a private bill, some single member is likely to stand to the beneficiary in the relation of agent or attorney, and will prepare the case on which the committee is expected to report. If he possesses the confidence of the committee the case may be accepted without examination as presenting the true facts, and it may happen that upon a favorable report of the committee a measure will be adopted, when the only

member having sufficient acquaintance with the facts to pass judgment upon them is the very member whose judgment, by reason of his interest, ought not to be taken. A case actually occurred at the recent session of Congress in which a member justified his making a report of a committee and assuming to speak for it without its direction on the ground that he alone of its members had looked into the facts. But under such circumstances, if the report had been acted upon as was intended and the measure adopted, the legislation would not even have been legislation by committee, since it would have expressed the judgment of a single member only. The same session furnished some striking illustrations of the need of greater care; one bill having passed both Houses which was an exact duplicate of a law then on the statute books and which every member had overlooked. Two other bills were passed for the allowance of private claims which had previously been allowed and paid, the evidence being on file in the proper office where it would have been found had the claims gone for examination to some suitable accounting officer or board. One of the two had been paid under a previous special act which Congress had overlooked, though the claimant could hardly have done so. Still another bill was to pay for the military equipment and time as though he had been a soldier in the civil war of a lad of twelve, too young, as all must see, for military service, who was permitted to play soldier as camp pet for a year—never enlisting and never being attached to any regiment—the whole performance being a boy's way of having enjoyment at the fine mess-table, never imagining at the time that the day would ever come when the assembled wisdom of the Nation would seriously propose to make him a gratuity for thus taking a long holiday at Government expense.

The cases here mentioned do not necessarily reflect upon the wisdom or just purposes of Congress, but they show very clearly the dangers of legislation under the whip and spur of a lash that outstrips deliberation.

But it is no more true that the Legislature is overwhelmed with business than that the Judiciary is. It was the solemn pledge of Magna Charter that justice should neither be denied nor delayed. But it is a matter of common observation that justice in the Federal Courts, by reason of the vast accumulation

of business, is now delayed to an extent that amounts to practical denial in many cases. Much of this accumulation has come from the great extension of Federal jurisdiction for temporary reasons growing out of the civil war, and perhaps the steps then taken ought in a measure to be retracted; but to retreat would be to breast a current still setting strongly in the same direction, and, if possible, is certainly not easy.

THE DANGERS OF THE FUTURE.

The condition of things, legislative and judicial, here brought to notice is likely to increase in difficulty with the growth of the union in States, in population, in business and in wealth. We shall be led further and further away from Constitutional forms, methods and principles, and possibly into dangers at present unknown and unsuspected. The dangers apparent are, however, sufficiently serious to challenge thoughtful and considerate attention.

It was said of the Roman empire in the period of Constantine that its Government was a Government of eunuchs. These creatures filled the Palace and surrounded the Emperor, so that access could be had to him only by their favor, and the representations upon which he acted were such as they saw fit to put before him. A similar state of things is likely to exist in any considerable country governed by a single ruler, since there must be an absolute impossibility in the ruler giving personal attention to all the subjects requiring it. Powers unknown to the Constitution of the country will then not unlikely, though hiding behind the throne, be greater than the throne itself.

A country possessing representative institutions may reasonably hope to escape any similar peril; but when the demands upon its Government become too great to be met in a Constitutional way, the peril is upon it. It is quite as possible for an aggregate body of popular delegates to subordinate their wills and their judgments to a seeming necessity in Government as for a prince to do so, and the liability to an improper control is as great in the one case as in the other. Whether the improper control shall be by a small part of the governing body or by those in no way connected with it is of less importance than the main fact that

Constitutional powers are improperly controlled, and the patriotic sentiment will seek for a remedy in the one case as earnestly as in the other.

NO ROOM FOR PRIVATE LEGISLATION.

The most conspicuous evil now attending National legislation springs from the vast aggregation of business demanding the attention of Congress, and leading in the end to a pressure upon the other departments of the Government which they cannot well sustain. To correct this, at least in part, two measures of relief are available:

1. The power now exercised by Congress to pass bills for the relief of individuals should, as far as may be found practicable, be taken away.

Of the bills passed at the recent session near 700 were of this class. If we suppose they receive proper attention they must have monopolized a large share of the session. But more than a hundred of them were vetoed by the President upon the ground that the facts upon which Congress had acted made out no equities. Had these bills received the attention which, according to the theory of representative institutions they are supposed to receive, the probabilities would be very strong that Congress was right and the President wrong in the view taken by them respectively; but when the actual course of business in Congress is borne in mind, the probabilities seem quite the other way.

Now, even if the demands upon the attention of Congress were not so great as they are, it would be obvious that it could not deal wisely and well with private claims, whose equities are only to be brought forward upon evidence. A legislative body is almost as much unfitted for the proper investigation as it is to try private controversies, and for precisely the same reasons, they ought not, therefore, to be entrusted to Congress at all. So firmly have the people of some of the States been convinced that legislative bodies ought not to deal with private claims that they have by their Constitutions forbidden its being done, and the prohibition is never regretted. The alternative of a Court of Claims or a Board of Audit acting under general rules is found to be the better way. It must be very rare, indeed, that a deserving case will arise which is so peculiar in its equities as to require special

legislative attention. Most of the recent relief bills passed by Congress have been bills granting pensions. But no one questions that pension cases ought to be provided for by general rules, to be applied by some proper known Board or Court. Special investigations into facts is required in nearly every case, and it is notorious that even with competent and careful officers giving attention exclusively to the subject, frauds are not always prevented. They are generally facilitated when the jurisdiction is assumed by a large body which, by its very size and organization, is unfitted for the necessary investigations.

If the business of Congress is hastily or unintelligently performed, we come at last to lose our respect for that body. If its method of procedure favors fraud and corruption, we, perhaps, suspect corruption in its members, and the public press, if an opportunity seems to offer for political advantage, or perhaps even for sensational purposes, will make positive charges which the public may accept as true. But this is to lose our respect for the law at its very fountain, and no greater calamity than this could possibly befall us. There can be no inherent strength in any Government whose laws are not received by the people as probably sound and well-considered, or whose decrees are not spontaneously accepted as presumptively wise and just.

It must be expected also that upright men, careful of their reputation, will hesitate if they do not altogether decline to give their services to the public in a legislative body whose work must necessarily, to a large extent, be poorly done, and in which management and assurance are likely to count for more than solid ability. Corrupt men, on the other hand, will crowd forward to occupy such places, because they well know that when results prove unsatisfactory abuse is likely to be general, and the public will have little ability, and perhaps as little inclination, to distinguish between those who do and those who do not deserve it. And right here, it may be remarked, is to be seen one of the chief reasons why municipal goverment has so very generally become corrupt. The general and indiscriminate charge of corruption against municipal officers, while it fails to establish particular offences against individuals, keeps integrity at a distance, and thus begets the corruption it charges.

LEGISLATION OUTSIDE THE CONSTITUTION.

2. We ought very carefully to avoid burdening the attention of Congress with propositions for legislation not within its Constitutional powers.

The habit of mind already mentioned, which magnifies unduly the Federal jurisdiction and power, is sometimes an evil of considerable magnitude, even when it results in no improper legislation. Here, again, we may take an illustration from the recent session of Congress. The member having it in charge was quite unable to secure attention to a bill for the reorganization of the Navy, but weeks were spent in discussing a bill in aid of State education—a subject which had no business in Congress at all. Other bills equally foreign to the Federal jurisdiction were introduced, referred and discussed. Now, when a bill is brought before Congress with which that body has no proper concern, a wrong is done to representative institutions, even though in the end it fails in adoption. The wrong is multiform; it increases an existing mischievous tendency; it strengthens and perpetuates an erroneous habit of thought; it withdraws from Federal concerns much needed attention, and the mischief is not limited to representative institutions of our own country, because whatever injuriously affects them puts all such institutions to a new trial at a time and under circumstances when the strain upon them seems already to be as much as they can well sustain.

One of the most intelligent and thoughtful of the writers on institutions, best known to us as the author of the "Treatise on Ancient Law," has recently, in some very striking essays, questioned, on historical probabilities, the likelihood of the useful duration of popular institutions. Reviewing to some extent their early history, and casting his eye over the nations of Christendom which have endeavored with little or no success to establish them, he sums up his conclusions as follows: "It is not too much to say that the only evidence worth mentioning of the duration of popular government is to be found in the success of the British Constitution during two centuries under special conditions, and in the success of the American Constitution during one century, under conditions still more peculiar and

more unlikely to recur." And he proceeds to give reasons why, as regards the British Constitution, "that nice balance of attractions which caused it to move evenly on its stately path, is perhaps destined to be disturbed." What the writer says is not easily disproved, and others besides himself, though supporters of popular government, have feared it might be everywhere approaching a calamitous crisis. But whoever considers the differences in race peculiarities and perceives that every people must have a development of institutions in its own way and according to its own genius and tendencies, will be slow in drawing lessons in Government for one people from the experience of others having characteristics essentially different. He will, therefore, judge of the probabilities of stable popular Government among English-speaking people upon the evidences supplied by their own experience. It is highly probable that the American people have been altogether too ready to assume that the political liberty which was good for them was equally good for all mankind, and that through the ages in the history of every people might be traced an aspiration for popular Government which in time must have full realization. But while we have been pleasing ourselves with such a fancy, current events have visited upon us many disappointments, until we are forced at last to the conclusion that we shall be wise if we speculate less upon the possible attainments in government of other people, and devote more careful thought to perfecting and preserving what has been done for ourselves.

All Americans, it may be assumed, desire to render complete the success of their experiment in popular Government. To do this it is necessary to hold as closely as possible to the principles upon which it was founded and which have attended its development. It is not sufficient to preserve forms if the substance escapes them, and it is plain that the substance of popular institutions is gone when the substantial power of the representative body has passed to the hands of a few of its members, or possibly to some external managing body. That to a considerable extent this is already the case we are compelled to admit, and when the excuse is advanced that in the nature of things this has become inevitable, the excuse, instead of relieving our anxiety, only quickens our fears and chills our hopes.

This is unavoidable, because the apparent necessity accustoms

the people to look with complacency upon crude and imperfect legislation, upon allowance of unmeritorious claims, upon frauds and upon the exercise of extra-constitutional and arbitrary authority. It begets a habit of thought which excuses evils of all sorts in government and tolerates in many cases the assumption of despotic powers. It is impossible to overrate the significance of these tendencies when we reflect that institutions spring from or are moulded by the habits of thought of the people, and that unwarranted acts which are generally excused will in time become the precedents whereby the rightfulness of official authority will be gauged and determined.

THE DUTY OF THE LEGAL PROFESSION.

The legal profession of the country stand at the portals of the future, charged with the duty of protecting the Constitutions, National and State, under which they exercise their functions as ministers of justice, and which constitute at once the defence of individual liberty and the guaranty of public order. It is a solemn and very onerous duty, and requires for its performance a careful and conscientious study of the emergencies of government as from time to time they arise. What these emergencies may require or demand cannot in advance be forseen, but the general obligation to do whatever may be possible to preserve Republican institutions in their integrity is plain, and if kept steadily in view will lead to safe results. In a few particulars, however, the obligation may be more definitely ascertained.

Accepting, as we must, the fact that modifications of the fundamental law are inevitable, it is a plain duty to restrict them as far as possible to the precise method agreed upon when the Constitution was formed, that is to say, to amendments duly formulated and regularly adopted. By this method alone is it certain that the system of liberty which has come down to us as a precious legacy may be preserved. When changes are voluntarily suffered to creep in by other ways, we cultivate a habit of mind which saps the foundation of our institutions and sets us afloat upon a sea of uncertainty without definite landmarks, where the most reckless and pushing is likely to be most influential and the most presumptuous, by the mere force of assurance, may sieze upon the helm and boldly steer the course ~~among~~ into

unseen dangers. But unless we are prepared to put the wisdom of the past behind us as foolishness, we shall never forget that the liberties we enjoy have been worked out for us through a succession of ages, by keeping the old landmarks steadily in view and by holding firmly to the teachings of experience. We have no warrant in history for an assumption that by a different road we should have reached the same advanced and enviable position.

Especially should every insidious change which threatens to creep in by usurpation of authority be met at the threshold and sturdily resisted. Any such change will owe its accomplishment either to general ignorance among the people regarding the fundamental principles of government, or to general indifference. In either case it would be evidence of a condition of things which would render the public mind fallow ground for the seeding of wild speculation and fanciful experiment, and especially for that wildest of all notions, that whatever is new is probably progressive and should therefore, for its very novelty, be welcomed and embraced.

This subject addresses itself with peculiar force to the legal profession. Upon that profession must the country in the main depend for keeping fresh in the minds of the people the vital truth that within the general landmarks of the Constitution must be found, not only the securities of liberty, but the true and only reliable guarantees of progress. And here the duty of patriotism is as obvious as it is important. We cannot pass it by without justly exposing ourselves to the charge of neglecting imperative obligations. The sentiment of patriotism, when wisely informed and strengthened, will not fail to hold in close and ardent embrace that admirable system of local, State and Federal Government which was founded by the fathers, and which is admirable as a whole in so far as it is kept strong, vigorous and efficient in all its parts and all its gradations.

Especially, also, should the tendency to the casting upon the representative institutions of the nation a burden they cannot bear without mischief, be carefully corrected as far as may be found possible, and efficiently guarded against for the future. We have already indicated the necessary means to this end. A clearer apprehension of the legitimate scope of Federal powers should be cultivated, and the attention of Congress should cease to be diverted from the proper objects of Federal jurisdiction;

and concurrent with this the overburdened Legislature should be restricted to the duty of making laws proper, and should no longer be allowed to undertake the adjustment of claims or the determination of individnal equities in cases where it is possible to make general laws available.

Finally, the habit of mind which consents to the doing of constitutional wrong, when it is supposed some temporary good may be accomplished, should be recognized as a foe to constitutional limitations and securities, and which therefore, at any cost, must be corrected.

These matters do not concern us alone, but they concern the world. In matters of government, America has become the leader and the example for all enlightened nations. ~~England and France alike~~ look across the ocean for lessons which may inform and guide their people. ~~Italy and Spain~~ follow more distantly, and the liberty-loving people of every country take courage from American freedom, and find augury of better days for themselves in American prosperity. But America is not so much an example in her liberty as in the covenanted and enduring securities which are intended to prevent liberty degenerating into license, and to establish a feeling of trust and repose under a beneficent government, whose excellence, so obvious in its freedom, is still more conspicuous in its careful provision for permanence and stability.

The Third Annual Meeting of the SOUTH CAROLINA BAR ASSOCIATION will be held in Columbia, on Wednesday, 7th December, 1887, beginning at 8 o'clock P. M.

WM. H. PARKER,
President

W. C. BENET.
Secretary,
Abbeville, S. C.